Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

CLIFF GREENE, pro se,

Petitioner,

v.

WCI HOLDINGS CORPORATION, WCI HOLDINGS II CORPORATION, ET AL., BIRLE, CO-CHAIRMAN, R.B. McKEON, CO-CHAIRMAN, S.A. SCHWARTZMAN, PRESIDENT AND CEO.

Respondents.

Petition For Writ Of Certiorari

To The United States Court Of Appeals

For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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63 pp

QUESTIONS PRESENTED

I. Whether The District Court, Southern District of New York, (SDNY) Judge David N. Edelstein, presiding, committed a prejudicial error when it dismissed plaintiff's complaint and motion for default judgment without a hearing.

II. Whether The District Court, SDNY, United States Magistrate Judge, Naomi Reice Buchwald, presiding, committed reversible error when it dismissed plaintiff's default judgment without a hearing pursuant to Rule 5-Fed. R. Civ. P.

III. Whether The District Court, SDNY, Judge Edelstein, presiding, committed reversible error when it dismissed plaintiff's default judgment without a hearing pursuant to Rule 5-Fed. R. Civ. P.

IV. Whether The District Court, committed reversible error when it relied upon affidavits submitted to the court by the mailers of documents, as opposed to U.S. postal service postmark. When it granted appellees motion to dismiss appellant's requested default judgment against appellees.

V. Whether The District Court, Southern District of New York, (SDNY), Judge David N. Edelstein, presiding, committed a prejudicial error when it granted defendant's 12 (b) 6 motion to dismiss plaintiff's complaint and motion in opposition; without a hearing.

VI. Whether The District Court, Southern District of New York (SDNY), Judge David N. Edelstein, presiding, committed a prejudicial error when it dismissed plaintiff's complaint and motion for default judgment without a hearing. Knowingly, that defendants had breached the Wickes Companies, Inc., "Warrant Agreement".

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Cliff Greene, pro se, respectfully prays that a Writ of Certiorari issue to review the judgment and Opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit on February 6, 1998 Docket No. 97-7311, and, its denial of petitioner's petition for rehearing on July 2, 1998, is reported and is printed here at Appendix "A-1" and "F-1".

The memorandum and order of the United States District Court for the Southern District of New York denied plaintiff's motion for default judgment, same is reported and is reprinted here as Appendix "B-1".

In addition, the District Court's judgment, Amendment XIV to the United States Constitution, opinion and order (78120), also order of The District Court are reprinted here as Appendices "E-1," "G-1," "D-1," and "C-1," respectively.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit that denied petitioner's petition for rehearing was entered on July 2, 1998. The Petition for Certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. SEC. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV to the United States Constitution is set forth in Appendix "G-1"

STATUTES AND RULES INVOLVED

42. U.S.C. Sec. 1983

Sec. 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subject, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Under this section governing civil action for deprivation of rights, Plaintiff can generally sue to enforce federal statutory rights as well constitutional rights. *Boxall v. Sequoia Union High School Dist.*, 464 F. Supp. 1104 (D.C. Cal. 1979).

Fed. R. Civ. P. 12(b)(6)

...if, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

District Court, Southern District of New York, (SDNY), Judge David N. Edelstein, presiding, committed prejudicial error when it dismissed plaintiff's complaint and its amendments, pursuant to Federal Rule of Civil procedure 12(b)(6) for failure to state a claim upon which relief can be granted; without a hearing. And, without ruling on plaintiff's submitted motion for judicial consideration.

PREJUDICIAL ERROR

Error substantially affecting appellant's legal rights and obligations. See *Erskine v. Upham*, 56 Cal. App. 2d 235, 132 P.2d 219, 228 (1942). Such may be grounds for new trial and reversal of judgment. See Fed. R. Civ. P. 59. A prejudicial error is one which affects or presumptively affects the final results of the trial. See *State v. Gilcrist*, 15 Wash. App. 893, 552 P.2d 690, 693 (1976). *Trepainer v. Standard Min. & Mill. Co.*, 58 Wyo. 29, 123 P.2d 378, 380 (1942).

See also error; Plain Error Rule.

The above-mentioned prejudicial error is in reference to lower court's Rule 56, Fed. R. Civ. P. and 12 (b) (6) violation.

STATEMENT OF THE CASE

The defendants perpetrated a fraud upon the court. The Honorable Naomi Reice Buchwald, United States Magistrate, presiding, acquiesced to the fraud.

Therefore, the plaintiff, Cliff Greene, pro se, pursuant to Rule 72(a) (non-dispositive matters) respectfully requests that This Court based on the facts and the law, reverse the Honorable Buchwald's Memorandum and Order. There is no rational basis in fact nor law --- for the denial of plaintiff's request for default judgment.

The defendants failed to timely answer or move with respect to the complaint. In accordance with a so-ordered stipulation, filed on March 9, 1992, a response to the complaint was required by April 2, 1992. Judge Buchwald contends that the defendant's answering papers made clear, service of their motion to dismiss was made by mailing on April 2, 1992. Fed. R. Civ. p 5(b) ("Service by Mail is complete upon mailing").

Judge Buchwald further contends, accordingly, since defendants timely complied with the Court-approved adjourned date for

service of an answer or motion directed to the complaint, plaintiff's motion is denied. It is so ordered.

Plaintiff alleges that the time within which the defendants may answer or otherwise move with respect to the complaint herein expired; prior to defendants' answer or otherwise move with respect to the complaint. Therefore, the request for default judgment, pursuant to Rules 6(b) (1) and 55(a) (b) (1) of the Federal Rules of Civil Procedure. And, Rule 2(a) of Judge Edelstein's rules for extension of time to answer or move against the summons and complaint.

Further, the above-mentioned allegation is based on a telephone call on April 2, 1992, between 5:30 and 6:00 p.m. Same, from defendants' counsel, James Robert Pigott (JP-5549). Counsel told me that since this date (4-2-92) was the last for filing answer to the complaint --- He was calling to see if he may inform the Hon. David N. Edelstein the next day (4-3-92) that he had spoken with me in reference to an additional extension of time to reply to the complaint --- At this point, I told counsel that, if the answer to the

complaint had not been filed with the court, as of that date (4-2-92) the defendants, were in default. Further, that it was up to Judge Edelstein, to grant additional extension and not the plaintiff.

Counsel was to call plaintiff the next day (4-3-92) to inform as to Judge Edelstein's decision; as to the requested extension of time to answer complaint.

Counsel may have called, however, since pressing business kept plaintiff away from home practically all day, we may have missed his call. In any event, the next day, Sat. 4-4-92, plaintiff received in the mail, same, postmarked April 3, PM 1992, copy of defendants' Memorandum of Law in support of their motion to dismiss the complaint, and, attached thereto, Notice of motion and exhibits.

Therefore, from the above, plaintiff concluded that the Court, the Honorable David N. Edelstein, had denied defendants; request for further extension of time, based, pursuant to Rules 6 (b) (1) and of course, pursuant to Rule 2(a) of Judge Edelstein's Rules for the extension of time to answer or move against the summons and complaint.

Defendants' affidavit, same dated and sworn to by James Robert Pigott, Jr., contains fraudulent statements. They are as follows:

1- That the defendants made a timely answer or move with respect to the complaint. In accordance with a so-ordered stipulation, filed on March 9, a response to the complaint was required by April 2, 1992.

Plaintiff contends that defendants' failure to timely answer or move with respect to the complaint came about as a result of defendants' service of their motion to dismiss was made by mailing on April 3, 1992, as opposed to April 2, 1992.

Affirmation of the above was an exhibit to Notice of Motion 4-6-92 that the postmark, New York, N.Y., Morgan GMF, April 3 PM 1992 10199 --- determines date of mailing. Further, the postal officials were willing to testify under oath if subpoenaed.

It is insufficient to simply enclose motion to dismiss the complaint and notice of motion, by depositing "a true copy of same in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States postal service within the State of New York --- same, addressed to

plaintiff. it is defendants' responsibility to see and to make certain that service by mail, is postmarked within time so ordered by stipulation. And, The Court's Order.

Defendants, on face, have failed to comply with the Honorable Edelstein's so ordered stipulation. Further, Fed. R. Civ. p. 5(b) ("Service by mail is complete upon mailing") is not, repeat not, applicable in this instance, because the deadline, the last day for filing answer or move to dismiss complaint; was not the day of service by mail. Service by mail --- is date postmarked by U.S. Postal authorities (Apr. 3 3PM 1992).

2- Page 2, par. 5, of James Robert Pigott's affidavit is a falsity. Plaintiff informed Mr. Pigott that, since his motion papers arrived with a postmark dated Apr 3 3 PM 1992, defendants were in default. The above is quite different from that of the defendants' counsel at #5, page 2 of his affidavit.

3- Page 2 at 7 of docket sheet, date -- 4-3-92, plaintiff contends that he did not, repeat, did not, file the motion to extend time. Plaintiff alleges that his name was erroneously and fraudulently used or placed as having made the motion -- when in

essence the motion was allegedly made by the defendant. If the defendants' names were used, it would have been in conflict with claim having made service by mail on April 2, 1992.

Plaintiff further alleges that defendants made request or motion to extend time. Same, was denied, because defendants were in violation of Rule 6 (b) (1) (2) --- Also, Judge Edelstein's Rule 2(a). Defendants, having learned of the denial of request to extend time --- hastened back to their offices, put hastily together Memorandum of Law in support of their motion to dismiss the complaint and their notice of motion --- reset metered postal machine, from April 3, 1992 to read April 2, 1992, deposited copy of the above in an official postal depository --- as so stated by affidavit of service, submitted by Theresa F. Mulligan, in Exhibit 3 of Mr. Pigott's affidavit.

Now, plaintiff alleges that the defendants' counsel then headed back to Foley Square, U.S. District Court, filed Memorandum of Law in support of their motion to dismiss the complaint, and their notice of motion. Defendants did not stop to think or realize that

the post office would stamp the official date of mailing April 3, 3 PM 1992 --- over their metered stamped date of April 2, 1992.

Case On Hold For Five Years

The Rulings, opinion, orders and Decisions were Fast and Furious in appellees favor five years ago. That is, until appellant submitted to the Court, proof positive that appellees' were in violation of the stipulation and court order. Is it not fair that the lower court, should have begun with the evidence submitted to the court, pursuant to Rule 60-(b) (2)? Not one word concerning The New Evidence, the default judgment, were mentioned in Judge Edelstein's opinion (78120) & order dated February 27, 1997. And neither was there any mention of the Default judgment --- In Judge Edelstein's judgment dated February 28, 1997, Filed Feb. 28, 1997. How fair is Justice?

3. Plaintiff contends now, as he did in his initial request to enter default, and, in his affidavit in support of default judgment against the defendants, that the time within which the defendants may answer otherwise move with respect to the complaint had expired; prior to defendants' answer or otherwise move with

respect to the complaint. Therefore, the request was made for default judgment, pursuant to rules 6(b)(1) and 55(a)(b)(1) of the Federal Rules of Civil Procedure. And, Rule 2(a) of Judge Edelstein's rules for extension of time to answer or move against the summons and complaint.

4. Plaintiff's Notice of Motion, same, dated April 6, 1992, stamped received, April 8, 1992 --- pro se office, moving the Court, before Hon. David N. Edelstein, at the United States Courthouse, Foley Square, New York, New York on April 20, 1992, at 9:30 am, the matter of default judgment was subsequently assigned to the Honorable Naomi Reice Buchwald, United States Magistrate; alleged, Re: order of reference to a Magistrate Judge --- so ordered, dated April 3, 1992, filed April 15, 1992 plaintiff, doubt that Judge Edelstein had any knowledge of this Order.

5. Plaintiff appeared at the Hon. Buchwald's chambers at the above-mentioned scheduled time, and was stopped at the door by a male staff member and was told that there was not going to be a hearing as previously scheduled -- reason, they had just received

the case and needed time to study same. However, plaintiff would be notified when the hearing was rescheduled.

6. Within forty eight (48) hours, plaintiff received an official letter from the Hon. Buchwald, same, postmarked PM 21 April 1992, and dated 20, April 1992, the very date we appeared for the scheduled hearing and were told that there would be no hearing that day. Plaintiff opened the above-mentioned letter, thinking that it was the new scheduled time and date of postponed hearing --- plaintiff was absolutely shocked and stunned beyond belief to find enclosed, memorandum and order denying plaintiff's motion for entry of a default judgment.

7. Plaintiff contends that the Hon. Buchwald's Memorandum and order denying default judgment based solely on defendant's answering papers alleging service of their motion to dismiss was made by mailing on April 2, 1992 - was erroneous and had no basis in the fact nor law.

Plaintiff respectfully requests that this court review affidavit by Teresa Mulligan, which was sworn to and notarized the 7th day of May 1992—That she took the envelope (containing

answering papers, motions, etc.), and deposited it in the official U.S. mailbox in the lobby of the building in which her offices are located at 45 Rockefeller Plaza, New York, New York at approximately 5:30 PM on April 2, 1992.

Plaintiff alleges that Theresa Mulligan lied under oath in her affidavit to this court. If Theresa Mulligan were truthful in her affidavit, then plaintiff asks why would counsel for defendants call Plaitiff between 5:30 pm and 6:00 pm on same date as Ms. Mulligan alluded to, April 2, 1992.

Counsel for defendants, James Robert Pigott, (JP-5549), conversation with plaintiff, had to do with the following: he was calling to see if he may inform the Hon. David N. Edelstein the next day (4-3-92) that he had spoken with me in reference to an additional extension of time to reply to the complaint.

Plaintiff contends that the defendants failed to timely plead or otherwise defends the above-captioned action—the postmark exhibit clearly shows that the defendants were in default. One full day beyond so-ordered stipulation. The defendants contend that in a sworn to affidavit dated 7th day of May, 1992 by Theresa

Mulligan, attested to the fact that on April 2, 1992, she deposited in an official U.S. mailbox in the lobby of the building in which defendants offices are located at 45 Rockefeller Plaza, New York, New York at approximately 5:30 pm in a postpaid envelope addressed to plaintiff and same containing defendant's defendant's motion to dismiss and other answering papers. If the service by mail, as mentioned herein above is true, then according to the law of evidence, the presumption of mailing and delivery, plaintiff would have received delivery on April 3, 1992. Delivery was made on April 4, 1992, which meant that mailing did not take place as affidavit indicated. But, instead as plaintiff contends it did and as postmark in the exhibit clearly shows that it did—on April 3, 1992.

LAW OF EVIDENCE

Sec. 80. PRESUMPTION OF MAILING AND DELIVERY

A letter shown to have been properly addressed, stamped and mailed is presumed to have been delivered in the due course of mail. The presumption is said to be based upon the probability that officers of the government will perform their duty. News Syndicate v. Gatti Paper Stock Corp., 256 N.Y. 211, 176 N.E. 169; Trusts and Guarantee Co. v. Barnhardt, 270 N.Y. 350, 1 N.E. 2d 459; Dulberg v. Equitable Life Assurance Society of United States, 277 N.Y. 17, 12 N.E. 2d 554. And it has been held that where the letter was mailed in the same city where it was to be delivered, there is a presumption that it was delivered the following day. News Syndicate v. Gatti Paper Stick Corp., supra. for a consideration of the post-mark as evidence of the date of mailing, see Collins, The Validity of Postmarks, 47 A.B.A. Jour. 371, an interesting article.

The District Court, SDNY, United States Magistrate Judge, Naomi Reice Buchwald, presiding, committed reversible error when it dismissed plaintiff's default judgment without a hearing pursuant to Rule 5-Fed. Civ. P., "Service by mail is complete upon mailing" however, it is the postmark that determines mailing. One need look no further than April 15 of each year, when tax payers scramble to have their tax returns postmarked before midnight.

U.S. Supreme Court, Rule 29.2 agrees that "Service by mail is complete upon mailing," but then it goes on to say that the mailing must bear a postmark showig that the document was mailed on or before the last day for filing. Appellant arguies that same point as same relates to appellees. The post office regulations, furnished to all metered mail users, require that the date must be correct, that metered mail be examined on receipt at the post office and that incorrect dates be over-postmarked with the correct date. (Re: postal manual, part 324-566). Appellant contends Rule 5-(a) and (b) Fed. R. Civ. P. is inapplicable in the instant case because it has to do with service and filing of pleadings and other papers that are subsequent to the original complaint. Appellee's stipulation agreement and the court's order required answer to appellant's original complaint.

It is infact defendants mailed its Answer to Summons and Original Complaint in an envelope properly addressed to plaintiff with first-class postage, registered from their office postage machine. Same dated April 2, 1992. However, this date was over stamped by U.S. Postal Service at the post office and rightfully so.

See Law of Evidence, U.S. Supreme Court, Rule 29.2. postal manual, part 324-566, and Rule 5 (a) (b) Fed. R. Civ. P., respectively. Finally, see precedent setting judical case law Uhlman v. Arnholdt & Schaefer Brewing Co., 53 Fed. 485 at 489. Same, dates back to 1893, one hundred five years ago. And it says the following:

UHLMAN ET AL. V. ARNHOLDT & SCHAEFER BREWING CO.
(Circut Court, E.D. Pennsylvania, January 4, 1893)

"Date of a post-mark upon a letter is not evidence that it was forwarded that day."

The District Court, SDNY, Judge Edelstein presiding, committed reversible error when it dismissed Plaintiff's default judgment without a hearing, pursuant to Rule 5-Fed. R. Civ. P. Appellant contends that Rule 5(b) was inapplicable in the instant case because the deadline, the last day for filing (April 2, 1992) answer or move to dismiss complaint was not the day of service by mail. Further, appellant contends that Rule 5(a) and 5(b) has to do with service and filing of pleadings and other papers that are subsequent to the original complaint. Appellees stipulation

agreement and the court's order required appellees to answer the summons and the original complaint.

The District Court committed reversible error when it relied upon affidavits submitted to the court by the mailers of the documents, as opposed to U.S.postal service postmark, when it granted appellee's motion to dismiss appellant's requested default judgment against appellees.

Documentary and Evidentiary Bases for Judgment

12. When written documents are relied on, they must be exhibited in full, and court would refuse to accept defendant's statement of substance of written instruments or of his interpretation of them or mere conclusions of law or restatemnets of allegations of pleadings. These beings insufficient on motion for summary judgment. See Walling v. Fairmont Creamery Co., (1943 CA 8 Neb) 139 F.2d 318, 7 CCH L.C.par 61892

REASONS FOR GRANTING THE WRIT

1. The District Court, Southern District of New York (SDNY), Judge David N. Edelstein presiding, committed prejudicial error when it granted defendants' 12(b)(6) motion to dismiss for failure of the pleading to state a claim upon which relief can be granted; without a hearing on the 12(b)(6) motion pursuant to Rule 56 of Fed. R. Civ. P.; Nor was a hearing held on plaintiff's motion in opposition to defendant's 12(b)(6) motion to dismiss.

Pursuant to Rule 56, Fed. R. Civ. P., a trial judge does not have the authority to grant a 12(b)(6) motion without a hearing.

Courts are required to treat 12(b)(6) motion as one for summary judgment.

Petitioner contends that it is unconstitutional to dismiss a complaint without without a hearing. It deprives plaintiff of a basic fundamental constituitonal right, due process.

Petitioner's complaint was dismissed without a hearing. What a travesty of justice.

Court are required to treat 12(b)(6) motions as summary judgment. See Rule 56 Fed. R. Civ. P.:

Rule 56, Fed. R. Civ. P.

Trial judge has no authority to grant summary judgment where no hearing was held on motion. See Dolese v. United States, (1976, CA 10 Okla) 541 F.2d 853, 76-2 USTC par. 9635, 38 AFTR 2d 79-5552, reh. den. (CA 10 Okla) 80-2 USTC par 9731, 44 AFTR 2d 79-5724 2d, cert. den., 445 U.S. 961, 64 L.Ed. 2d 236, 100 S. Ct. 1647.

It has been argued that Local District Court Rule 3 permits judges to dismiss a complaint without a hearing. Petitioner argued that Local Court's Rules do not supersede Fed. R. Civ. P. It is petitioner's understanding that the function of the Court is not to resolve disputes between parties—the function of the Court is to determine what issues of fact, if any, are triable. A 12(b)(6) motion to dismiss may be dismissed only when there are no sets of issues of facts involved.

Petitioner contends that is is a fact that defendants entered into a court ordered stipulation of settlement class action, on August 17, 1990, same, bought out the common stockholders of Wickes Companies, Inc., but excluded the Wickes warrant-holders, thereby breaching the Wickes "Warrant Agreement." Both were to be treated equally in the event of a merger or consolidation with another company or corporation. See page #3 of Opinion to Order (78120)

at Appendix D-1 attached hereto. For further information, see Appendix H-1. Further, petitioner understand that this court (U.S. Supreme Court) has recently ruled that any cause of action that has to do with a monetary award is a triable issue.

RULES OF THE SUPREME COURT
RULE 10

Petitioner respectfully request that a writ of certiorari be granted pursuant to Rule 10 (a) (c) re: Second Circut Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the U.S. District Court Southern District of New York as to call for an exercise of U.S. Supreme Court power of supervision re: herein above-mentioned Rule 56, Fed. R. Civ. P. and 12 (b) (6) violation.

Rule 10 (c), Second Circut Court of Appeals, has decided a federal question in a way that conflicts with applicable decision of the U.S. Supreme Court. See Dolese v. United States, 100 S. Ct. 1647 re: above-mentioned Rule 56, Fed. R. Civ. P. and 12 (b) (6) violation.

The District Court, Southern district of New York, (SDNY), Judge David N. Edelstein, presiding, committed a prejudicial error when it dismissed plaintiffs complaint and motion for default judgment without a hearing. Appellant contends that it is unconstitutional to dismiss a complaint without a hearing. It deprives one of a basic fundamental constitutional right, due process. The 5. and 14. Amend. are cherish rights that one should never be deprived of ----, intentionally or unintentionally.

Rule 56~Fed. R Civ. P.

Trial Judge has no authority to grant summary judgment where no hearing was held on motion. See Dolese V. United States (1976, CA 10 okra) 541 F 2d 853, 76-2 USTC par. 9635,38 AFTR 2d 76-5769, later app (CA 10 okra) 605 F 2d 1146, 79-2 USTC par. 9540, 44 AFTR 2d 79-5552, reh dew (CA 10 okra) 80-2 USTC par. 9731, 44 AFTR 2d 79-5724 2nd Cert den 445 US 961, 64 L Ed 2d 236, 100 S CT 1647.

CONSTITUTIONAL LAW

4. Core of due process is right to notice and a meaningful opportunity to be heard. See U.S.C.A. Const. Amend. 5. Petitioner has been deprived of this cherished constitutional right. Petitioner further contends that it was unconstitutional for the lower court to dismiss plaintiff's complaint without a hearing. It deprived plaintiff of a basic fundamental constitutional right, due process. Repeat, "The core of due process is the right to notice, and a meaningful opportunity to be heard" wrote Chief Justice William Rehnquist in the court's terse opinion, re: "No constitutional right to lie" (N.Y. Times Editorial, page A14, January 24, 1998)". See LaChance v. Erickson, cite as 118 S. Ct. 753 (1998), No. 96-1395, argued Dec. 2, 1997, decided Jan. 21, 1998.

Fairness of Justice - Amend. 14, Sec. 1 Note 64

Due process is not measured by the yearstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of decency and fairness that has been woven by common experience into the fabric of acceptable conduct. *Breithaupt v. Abram,* 77 S.Ct. 408, 352 U.S. 432, 1 L.Ed.2d448 (N.M. 1957).

14 Amend. Sec. 1 notes 3 and 14, makes it crystal clear the persons similarly situated may not be treated differently.

14 Amend, Sec. 1 Note 3 - Equal Protection Clause

Persons similarly situated

Denial of equal protection may occur when valid law is administered in a manner that unjustly discriminates between similarly situated persons. See Stone v. Chelan County Sheriffs Dept., Wash. 1988, 756 p. 2d, 110 Wash. 2d 806.

Under this section of the 14. Amend. governing civil action for deprivation of rights, plaintiff can generally sue to enforce statutory rights as well as constitutional rights. See Boxall v. Sequoia Union High School Dist., D.C. Cal. 1979, 464 F. Supp. 1104.

14. Amend Sec. Note 14 - Equal Protection Clause

Persons similarly situated

In context of allegation that similarly situated persons have been treated differently, substantive due process considerations are virtually coextensive with equal protection guarantees of this amendment. See Kaufman v. Board of Trustees, Community College Dist. No. 508, D.C. III. 1982. 552 F. Supp. 1142.

28 U.S.C., Sec. 1651(a)

The petitioner prays that this Court, the highest in our country *make the wrong in this case right.* Then justice would have prevailed. This Court has the authority to do just that. *See 28* U.S.C., Sec. 1651(a) below:

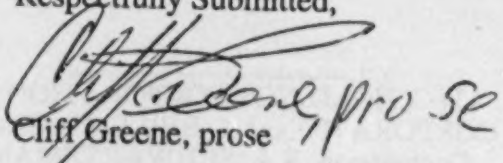
(a) The Supreme Court and all Courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principle of law. 1651(a) is an extraordinary remedy which may be issued only "under circumstances compelling such action to achieve Justice. " Thus, the remedy has been limited to situations of clear deprivation of statutory and constitutional rights or complete miscarriage of justice and just plain fundamental fairness.

CONCLUSION

For the reasons set forth abvove, a writ of certioari should issue to review the judgement and opinion of the Court of Appeals in this Matter.[1]

Dated: September 22, 1998

Respectfully Submitted,



Cliff Greene, prose

1333 President Street

Brooklyn, New York 11213

(718) 493-7028

[1] If this court elects not to address the issues presented in this writ at present time, it is requested that the writ issue and that the matter be remanded to the court of appeals for redetermination in light of this court's opinions in *Murray, supra, and Sequram, supra.*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1997

(Argued: January 30, 1998 Decided: February 6, 1998)

Docket No. 97-7311

CLIFF GREENE,

Plaintiff-Appellant,

—v.—

WCI HOLDINGS CORPORATION; WCI HOLDINGS II CORPORATION; J.R. BIRLE, Co-Chairman; R.B. MCKEON, Cochairman; S.A. SCHWARTZMAN, President and CEO,

Defendants-Appellees.

Before:

CALABRESI, CABRANES, and HEANEY,

*Circuit Judges.**

Appeal from a judgment of the United States District Court for the Southern District of New York (David N. Edelstein,

---

* The Honorable Gerald W. Heaney, Circuit Judge for the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Judge) dismissing the plaintiff's complaint for failure to state a claim upon which relief may be granted and for lack of subject matter jurisdiction.

Affirmed.

CLIFF GREENE, Brooklyn, NY, *pro se.*

CAROLINE S. PRESS, Solomon, Zauderer, Ellenhorn, Frischer & Sharp, New York, NY (Louis M. Solomon, of counsel), *for Defendants-Appellees.*

PER CURIAM

1. Facts and Procedural History

Cliff Greene, *pro se,* appeals from a judgment of the United States District Court for the Southern District of New York (David N. Edelstein, *Judge)* dismissing his complaint both for failure to state a claim upon which relief could be granted, and for lack of subject matter jurisdiction.

Greene filed a complaint in January 1992, alleging violations of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b); the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.;* 42 U.S.C. §§ 1981 and 1983; and the United States Constitution. Greene named as defendants WCI Holdings Corporation, WCI Holdings II Corporation, and some of the officers of these corporations—J.R. Birle, R.B. McKeon, and S.A. Schwartzman. Greene alleged that, as the result of the defendants' actions in violation of the above laws, certain warrants Greene held in Wickes Companies, Inc. lost value when Wickes was acquired by WCI Holdings.

In February 1992, Greene and counsel for the defendants entered into a stipulation extending the time for the defendants to answer the complaint until April 2, 1992. The stipulation was memo-endorsed "so ordered" by the district court. On April 3, 1992, defendants filed with the court a motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). The motion was dated April 2, 1992, and an affidavit of service was attached declaring that it had been served on the plaintiff by placing it in a mailbox on April 2, 1992 at 5:30 p.m. Greene received a copy of the motion to dismiss in the mail on April 4, 1992. The envelope was postmarked April 3, 1992.

On April 8, 1992, Greene moved for a default judgment, alleging that defendants' motion to dismiss was untimely since it had been submitted on April 3, 1992 (the day it was postmarked). On April 21, 1992, Magistrate Judge Buchwald filed a memorandum and order denying Greene's motion for default. The magistrate judge reasoned that under Federal Rule of Civil Procedure 5(b), service was accomplished when the motion to dismiss was mailed on April 2. Greene objected to the report in timely fashion, and Judge Edelstein denied his objections by order dated May 28, 1992.

Meanwhile, Greene had submitted a memorandum of law opposing defendants' motion to dismiss the complaint. On July 8, 1992, Magistrate Judge Buchwald recommended that the motion to dismiss the complaint be granted. Greene filed timely objections to the report and recommendation. The case lay dormant until the district court accepted the report and recommendation and granted the motion to dismiss. Judgment was entered on February 28, 1997, and Greene appealed.

II. Discussion

On appeal, Greene argues a) that the district court erred in holding that the motion had been served when the defendants' claim was placed in the mailbox on April 2 rather than when it was postmarked on April 3; and b) that the district court should not have dismissed his complaint on the papers without conducting an oral hearing. We find no error in the district court's holding and, therefore, affirm.

A. Service by Mail

Federal Rule of Civil Procedure 5(b) plainly provides that "[s]ervice by mail is complete upon mailing." The question is what constitutes a "mailing"—is it the placing of an envelope in a mail box or the postmarking of it by postal service employees? Although the Second Circuit has not addressed this precise issue, there is nothing in Rule 5(b) or our case law to indicate that the date of postmark, or the date of receipt, rather than the date of placing it in the mail controls. *See, e.g., United States v. White,* 980 F.2d 836, 840 n.8 (2d Cir. 1992) (service effected when papers were mailed regardless of when they were received).

The First Circuit addressed the issue of what constitutes service by mail in *Rivera v. M/TFossarina,* 840 F.2d 152 (1st Cir. 1988), and held that "[f]or service by mail to be valid under Rule 5(b) the pleading or document has to be 'placed in an envelope addressed to . . . the opposing attorney . . . and deposited in a United States Post office or post office box.'" *Id.* at 155 (quoting 4A **Charles Allan Wright & Arthur R. Miller, Federal Practice and Procedure** § 1148, at 432-33 (2d ed. 1987)). Similarly, the D.C. Circuit has held that, under Rule 5(b), " '[s]ervice is deemed complete at the instant the documents are placed into the hands of the United States Post Office or a Post Office Box.'" *United States v. Kennedy,* 1998 WL 11780, at *6 (D.C. Cir. Jan. 16, 1998) (quoting 1 James Wm. Moore, et al., Moore's Federal Practice § 5.04[2][a][ii], at 5-28 (3d ed. 1997)). We think this is the sensible rule, and, hence, hold that service under Rule 5(b) is accomplished when the envelope is deposited at a post office or in a mail box.

Greene further argues that, apart from the legal issue of when "mailing" is complete, the defendants' factual allegation that they placed the envelope in the mailbox on April 2, 1992, is false. The magistrate judge and district court considered and rejected this argument, and their decision to believe the defendants' affidavit (which stated that the envelope had been placed in the mailbox on April 2) was not clearly erroneous. Accordingly, Greene's motion for default judgment was properly denied.

B. Failure to Conduct Oral Hearing

Greene argues that the district court should have held an oral hearing before dismissing his complaint. He contends that an oral hearing is required by the Due Process Clause of the United States Constitution and by Federal Rule of Civil Procedure 56. Rule 56 is not relevant, however, because his complaint was dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). And we do not believe that Rule 12(d), which provides that defenses shall be "heard and determined before trial," confers a right to an oral hearing before dismissal. As we noted over thirty years ago, "[m]otions may be decided wholly on the papers, and usually are." *World Brilliance Corp. v. Bethlehem Steel Co.*, 342 F.2d 362, 366 (2d Cir. 1965).

Every circuit to consider the issue has determined that the "hearing" requirements of Rule 12 and Rule 56 do not mean that an oral hearing is necessary, but only require that a party be given the opportunity to present its views to the court. *See*

Lujan v. National Wildlife Fed'n, 497 U.S. 871, 910 (1990) (Blackmun, J., dissenting) (noting that "[t]he Courts of Appeals consistently have recognized . . . that Rule 56 does not necessarily contemplate an oral hearing") (internal quotation marks and citation omitted); *see, e.g., Cray Communications, inc. v. Novatel Computer Sys.*, 33 F.3d 390, 396 (4th Cir. 1994) (oral hearing on summary judgment at discretion of trial court); *Chrysler Credit Corp. v. Cathey*, 977 F.2d 447, 449 (8th Cir. 1992) ("hearing" on summary judgment motion may consist of written rather than oral argument); *Arrieta-Gimenez v. Arrieta-Negron*, 859 F.2d 1033, 1042 (1st Cir. 1988) (same); *Geear v. Boulder Community Hosp.*, 844 F.2d 764, 766 (lOth Cir. 1988) (same); *Moore v. Florida*, 703 F.2d 516, 519 (llth Cir. 1983) (same); *Allied Chem. Corp. v. Mackay*, 695 F.2d 854, 856 (Sth Cir. 1983) (per curiam) (same); *Dougherty v. Harper's Magazine Co.*, 537 F.2d 758, 761 (3d Cir. 1976) (plaintiff must be given opportunity to be heard, either orally or in

writing, prior to Rule 12(b)(6) dismissal); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 391 (6th Cir. 1975) (Federal Rules do not require oral hearing on motion to dismiss).

Similarly, we find no merit in Greene's claim that a dismissal of a complaint without an oral hearing violates due process. The Supreme Court has held that "the right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations." *Federal Communications Comm'n v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 276 (1949). And the circuit courts that have addressed the question of whether an oral hearing is required on motions to dismiss in civil cases have uniformly held that no oral hearing is required by the Due Process Clause. *See, e.g., United States v. One 1974 Porsche 911-S*, 682 F.2d 283, 286 (1st Cir. 1982) ("There is no constitutional right to oral argument on a summary judgment motion."); *Dayco*, 523 F.2d at 391 (denial of an oral hearing before granting a motion to dismiss does not violate "fundamental notions of fairness and due process of law"); *Spark v. Catholic Univ.*, S10 F.2d 1277, 1280 (D.C. Cir. 1975) ("due process does not include the right to oral argument on a motion"); *Dredge Corp. v. Penny*, 338 F.2d 456, 464 n.14 (9th Cir. 1964) ("The opportunity to be heard orally on questions of law is not an inherent element of procedural due process, even where substantial questions of law are involved.").

We note that Greene has not shown that he was denied the right to be heard and or the opportunity to present his case in a meaningful way. He filed extensive written arguments with the district court, which allowed him to address the specific issues of law with which the district court was concerned. Under the circumstances, we hold that the decision whether or not to hold an oral hearing on a motion to dismiss lies in the sound discretion of the trial court. And the district court did not abuse its discretion in denying oral argument in the case before us.

* * *

Having considered all of Greene's arguments and found them to be without merit, we affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- x

CLIFF GREENE, :

Plaintiff, :

-against- : **Filed April 21 1992**

WCI HOLDINGS CORPORATION, :
WCI HOLDINGS II CORPORATION, et al.
J.R. BIRLE, CO-CHAIRMAN, R. B. :
McKEON, CO-CHAIRMAN, S.A.
SCHWARTZMAN, PRESIDENT AND CEO, :

Defendants. :

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MEMORANDUM AND ORDER
92 Civ. 0559 (DNE)

NAOMI REICE BUCHWALD
UNITED 8TATE8 MAGISTRATE

Plaintiff moved by notice of motion, dated April 6, 1992, for entry of a default judgment, on the ground that defendants failed to timely answer or move with respect to the complaint. In accordance with a so-ordered stipulation, filed on March 9, 1992, a response to the complaint was required by April 2, 1992. As defendants' answering papers make clear, service of their motion to dismiss was made by mailing on April 2, 1992. Fed. R. Civ. P. 5(b) ("Service by mail is complete upon mailing.").

Accordingly, since defendants timely complied with the court approved adjourned date for service of an answer or motion directed

to the complaint, plaintiff's motion is denied.

IT IS SO ORDERED.

DATED: New York, New York
April 20, 1992

/s/
NAOMI REICE BUCHWALD
UNITED STATES MAGISTRATE JUDGE

Copies of the foregoing Memorandum and Order have been mailed on this date to the following:

Mr. Cliff Greene
1333 President Street
Brooklyn, New York 11213

Louis M. Solomon, Esq.
Stein, Zauderer, Ellenhorn, Frischer & Sharp
45 Rockefeller Plaza
New York, New York 10111

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CLIFF GREENE, pro se

Plaintiff,

Filed
May 29 1992

-against-

WCI HOLDINGS CORPORATION, et al.,

Defendants.

ORDER
92 Civ. 0559 (DNE)

EDELSTEIN, District Judge:

The above-captioned case has been assigned to Magistrate Judge Buchwald for all purposes. In a Memorandum and Order dated April 21, 1992 (the "Memorandum and Order"), Magistrate Judge Buchwald denied plaintiff's motion for a default judgment. Plaintiff has filed objections to the Memorandum and Order with this Court.

This Court must modify or set aside any portion of a Magistrate Judge's order "found to be clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a). Here, Magistrate Judge Buchwald found that defendants served a response to the complaint, a motion to dismiss, on April 2, 1992, as required by a so-ordered stipulation.

Service was made by mailing on April 2, 1992, in accordance

with Fed. R. Civ. P. 5(b), which provides in relevant part that, "Service by mail is complete upon mailing."

Magistrate Judge Buchwald's Memorandum and Order was therefore neither clearly erroneous nor contrary to law. Plaintiff's objections are therefore denied.

SO ORDERED.

Dated: May 28, 1992
New York, New York

/s/ David N. Edelstein

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CLIFF GREENE,	:	
Plaintiff,	:	**Filed**
-against-	:	Feb. 27, 1997
WCI HOLDINGS CORP.; WCI HOLDINGS II CORP., et al.; J.R. BIRDIE, co-chairman, R. B. McKEON, cochairman, S.A. SCHWARTZMAN, President & CEO,	:	
Defendants.	:	

OPINION & ORDER 78120
92 Civ. 0559 (DNE)

APPEARANCES: CLIFF GREENE, Brooklyn, New York, pro se.

STEIN, ZAUDERER, ELLENHORN, FRISCHER & SHARP, New York, New York, (Louis M. Solomon, Esq., and James Robert Pigott, Jr., Esq., of counsel), for defendants.

EDELSTEIN. District Judge:

Presently before this Court are plaintiff Cliff Greene's ("plaintiff" or "Greene") objections to a Report and Recommendation ("Report") by Magistrate Judge Naomi Reice Buchwald ("Magistrate Judge Buchwald") recommending that defendants' motion to dismiss plaintiff's complaint with prejudice pursuant to Federal Rules of Civil Procedure ("Rules") 12(b)(1) and 12(b)(6) be granted. For the following reasons, defendants' motion is granted.

BACKGROUND

This matter reaches this Court framed as a Rule 12(b)(6) motion. Accordingly, the facts recited herein are drawn strictly from plaintiff's complaint, except where specifically noted and justified. See Fed. R. Civ. P. 12(b)(6); Kopec v. Coughlin, 922 F.2d 152, 155-56 (2d Cir. 1991). Plaintiff filed with the Clerk of the Court of the Southern District of New York a document titled "Complaint," attached to which are two other documents: (1) an affidavit seeking injunctive relief and a temporary restraining order; and (2) a document titled "Plaintiff Demands Trial By Jury" which is written as a brief. See (Complaint, Greene v. WCI Holdings Corp., 92 Civ. 0559, attached to which is (Affidavit of Cliff Greene for Injunctive Relief and Temporary Restraining Order, Greene v. WCI Holdings Corp., 92 Civ. 0559 ("Greene Aff.") (Jan 22, 1992), and (Plaintiff Demands Trial By Jury, Greene v. WCI Holdings Corp., 92 Civ. 0559 ("Jury Demand") (Jan. 21, 1992).) Because the documents are part of the complaint, they may be considered in deciding defendants' motion to dismiss. Brass v. American Film Technolocies Inc., 987 F.2d 142, 150 (2d Cir. 1993) (holding that on a Rule 12(b)(6) motion, a court may consider, inter alia, documents attached to, or incorporated by reference into, a complaint). Moreover, because plaintiff is a pro se litigant opposing a Rule 12(b)(6) motion, the factual allegations in plaintiff's complaint (and attached documents) will be construed in the light most favorable to plaintiff. See LaBounty v. Adler, 933 F.2d

121, 123 (2d Cir. 1991) (courts must construe pleadings in the light most favorable to the party opposing a Rule 12(b)(6) motion); Elliot v. Bronson, 872 F.2d 20, 21 (2d Cir. 1989) (courts must apply less stringent standards to pro se litigants' submissions).

Plaintiff alleges that between April 1985 and April 1987, he purchased 160,000 warrants (the "warrants") to purchase common stock in the Wickes Companies, Inc. ("Wickes"). (Greene Aff. [, 2,3.) Plaintiff paid $481,532.24 for the warrants, each of which entitled plaintiff to buy one share of Wickes' common stock for $4.43. Id. I 2. The Wickes warrants were issued pursuant to a warrant agreement (the "warrant agreement") which set forth the rights and obligations of Wickes and the warrant holders. The warrant agreement provided that, if Wickes merged with, or sold its assets to, another firm, the Wickes warrant holders would be entitled to the same consideration as the holders of Wickes common stock.

Effective August 13, 1987, both Wickes common stock and Wickes warrants underwent a "five for one reverse split," which left plaintiff with 32,000 warrants. (Jury Demand at 2.) Each post-split warrant entitled plaintiff to purchase one share of Wickes common stock at $22.15 per share. Id. One year later, in August 1988, "Wickes announced that it had agreed to be acquired by a newly organized company formed by members of its senior management and Drexel Burnham Lambert Inc." Id. Under the terms of this management-led buyout, "approximately 83% of Wickes' outstanding common shares

were to be purchased in a tender offer at a price of $12 cash per share." Id. The Wickes warrants, however, were not to be purchased in the merger. Id.

On August 19, 1988, the last trading day before the buyout was announced, the Wickes warrants' closing price on the New York Stock Exchange ("NYSE") was "approximately $3.00 per warrant." Id. at 3. Plaintiff alleges that "after the announcement of the management-led buyout, the price of the warrants dropped radically," and have traded at less that $.125 per warrant. Id. The proposed management-led buyout, however, was never consummated.

On October 26, 1988, Wickes announced another proposed merger, this time with WCI Holdings, Inc. ("WCI") in which WCI agreed to make a tender offer of $11.25 per share for 38,324,444 shares, or approximately 80%, of Wickes common stock. Id. Under the terms of the merger, each publicly held share of Wickes common stock would be exchanged for .45 shares of a new class of "Wickes 15 1/2% cumulative exchangeable redeemable preferred stock" ("Wickes preferred stock"), which in turn could be exchanged for one share of "WCI 15 1/2% cumulative redeemable exchangeable preferred stock" ("WCI preferred stock"). Id. at 4. Under the merger, the Wickes warrants were to remain outstanding until a "follow-up merger" was completed, at which time they could be exercised in the same manner as the Wickes common stock-that is, into .45 shares of Wickes preferred stock, which could then be exchanged for one share of WCI

preferred stock. Id. As a result of these steps, Wickes would become a wholly-owned subsidiary of WCI, and the holders of Wickes preferred stock would receive WCI preferred stock. On October 27, 1988, the day after this proposed merger was announced, the warrants closed on the NYSE at a price of $.25 per warrant. Id.

Between November 1988 and April 1989, the proposed merger took place as described. The net effect of the merger on the warrants was a dramatic drop in their price. The drop appears to be because each warrant--at an exercise price of $22.15--could now only be exercised into .45 shares of WCI preferred stock which was valued at $11.25. Id. at 7.

In May 1989, Wickes, WCI, and several other parties were sued in a class action in Delaware by one of the Wickes warrant holders (the "Delaware case"). Although in the context of a Rule 12(b)(6) motion this Court is primarily confined to judging the adequacy of the Complaint, this Court may also judicially notice public records submitted to it, see Morelli v. Cedel, No. 96 Civ. 2874, 1997 WL 61499, at *8 n.5 (S.D.N.Y. Feb. 13, 1997); Brass, 987 F.2d at 150, such as the Complaint and opinions filed in the Delaware case. These documents were submitted to this Court as exhibits to defendants' notice of motion to dismiss. (Notice of Motion, Greene v. WCI Holdings Corp., 92 Civ. 0559 ("Notice of Motion") at Exhs. C-E (April 2, 1992).) The class action asserted claims for breach of the warrant agreement, breach of good faith and fair dealing, breach of

fiduciary duty, and misrepresentation. Id. at Exh. C at 1-2. As a warrant holder, plaintiff was a member of the putative class in the Delaware case. Prior to class certification, however, the Delaware court dismissed plaintiffs' claims, granting defendants' motion to dismiss for failure to state a claim. Id. at 10.

On January 23, 1992, plaintiff initiated this action.

Should be dismissed with prejudice. With no federal law claims remaining, this Court finds that Magistrate Judge Buchwald's recommendation that this Court decline to exercise pendant jurisdiction over the *remaining* state law claims is not clearly erroneous. Accordingly, this Court find that that recommendation should be adopted, and that plaintiff's state law claims should be dismissed for lack of subject matter jurisdiction.

CONCLUSION

IT IS HEREBY ORDERED THAT plaintiff's federal securities law claims, RICO claims, and constitutional claims are dismissed with prejudice.

IT IS FURTHER ORDERED THAT plaintiff's state law claims are dismissed for lack of subject matter jurisdiction.

IT IS FURTHER ORDERED THAT Magistrate Judge Buchwald's Report and Recommendation is adopted insofar as it concerns plaintiff's federal securites law claims, RICO claims, and state law claims.

SO ORDERED.

Dated: New York, New York
February 27, 1997

/s/ David N.Edelstein

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CLIFF GREENE,

Plaintiff,

-against-

WCI HOLDINGS CORP.; WCI HOLDINGS II CORP., et.al.; J.R.BRIDLE, co-chairman, R.B. MCKEON, co-chairman, S.A. SCHWARTZMAN, President & CEO,

Defendants.

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Filed
Feb. 28, 1997

92 CIVIL 0559 (DNE)
JUDGMENT

Defendants having moved to dismiss the Complaint pursuant to FedRCivP 12, and the said motion having come before the Honorable David N. Edelstein, United States District Judge, an the matter having been referred to the Honorable Naomi Reice Buchwald, who having issued a Report and Recommendation recommending that defendant's motion to dismiss be granted, and the Court thereafter on February 27, 1997, having rendered its Opinion (78120) & Order granting Defendants' motion to dismiss the Complaint, it is,

ORDERED, ADJUDGED AND DECREED: That pursuant to the Court's Opinion (78120) & Order, the Report and Recommendation of Magistrate Judge Buchwald is adopted; accordingly, the plaintiff's federal securities law claims, rico claims, and constitutional claims are dismissed with prejudice, it is further,

ORDERED, That plaintiff's state law claims are dismissed for lack of subject matter jurisdiction and the complaint is hereby dismissed.

DATED: New York, New York
February 28, 1997

JAMES M. PARKISON

Clerk of Court

By:

/s/ James ————?

Deputy Clerk

This document was entered on the docket on 3/5/97.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE 111
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the second day of JUL one thousand nine hundred and ninety-eight.

Greene

Appellant,

Filed
July 2, 1998

v

WCI Holdings Corp.

Appellee.

Dkt No: 97-7311

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Cliff Greene.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such Judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/
Beth J. Meador
Administrative Attorney

p o ccc
inbancdn_frm

AMENDMENT XIV TO UNITED STATES CONSTITUTION CITIZENSHIP RIGHTS NOT TO BE ABRIDGED

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In Re Wickes Companies, Inc. Securities Litigation	)
This Document Relates to: ALL ACTIONS	)

Master File
No. CV-88-6142-WPG

NOTICE OF PENDENCY OF CLASS ACTION AND SETTLEMENT AND HEARING THEREON

TO: ALL PERSONS AND ENTITIES WHO WERE BENEFICIAL OWNERS OF ANY SHARES OF THE COMMON STOCK OF WICKES COMPANIES, INC. ("WICKES") AT ANY TIME FROM AUGUST 22, 1988 TO AND INCLUDING APRIL 13, 1989.

THIS NOTICE MAY AFFECT YOUR RIGHTS. YOU ARE URGED TO READ IT CAREFULLY. IF YOU WERE A BENEFICIAL OWNER OF ANY SHARES OF THE COMMON STOCK OF WICKES AT ANY TIME FROM AUGUST 22, 1988 TO AND INCLUDING APRIL 13, 1989 (THE "CLASS PERIOD"), YOU ARE A MEMBER OF THE CLASS AND MAY BE ENTITLED TO SHARE IN THE PROCEEDS OF THE SETTLEMENT DESCRIBED IN THIS NOTICE.

This Notice is given pursuant to Rule 23 of the Federal Rules of Civil Procedure and Pursuant to an Order of the United States District Court for the Central District of California (the "District Court"). The purpose of this Notice is to inform you of the pendency of this consolidated action as a Class Action and of a proposed Scttlement pursuant to a Stipulation of Settlement dated August 17, 1990, filed with the District Court, providing, among other things, for the creation of a Settlement Fund consisting of $3.850,000 in cash, plus interest, and other contingent amounts.